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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a compensable taking of property occur under the Fifth Amendment to the United States Constitution based solely upon a property owner's claim that a land use regulation denies him of "all economically viable use" of the property?

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STATEMENT OF THE CASE

Petitioner, David H. Lucas, is owner of two vacant oceanfront lots in the Beachwood East Subdivision at the Wild Dunes Development on the Isle of Palms, Charleston County, South Carolina. The Respondent, South Carolina Coastal Council, is a state agency, charged with the management of coastal resources within the eight coastal counties of South Carolina. Respondent, among other things, has responsibility for implementation of the 1988 Beachfront Management Act, Act 634, which amended the 1977 Coastal Zone Management Act.

The beach in question is very dynamic and the Petitioner's two lots have been under water or subject to tidal intrusion several times since 1963. Existing homes and man-made structures in the area have been threatened by erosion and various local and state permits have been issued in recent years for erosion abatement projects including sand scraping, sand bagging, sand nourishment and erosion control devices.

Pursuant to Section 48-39-280 of the Act, a setback scheme was established to control construction near the ocean. This scheme included a baseline located at the most landward shoreline in the past 40 years, a setback line located by multiplying 40 times the annual erosion rate, and a 20 foot no construction line located 20 feet behind the baseline.

Based upon the requirements of Section 48-39-280, the baseline was located in the road landward of the two lots in question. Due to the location of the baseline, no permanent man-made structure could be built upon the lots. Such construction was prohibited by Section

48-39-300 and use of the lots was limited to temporary construction and passive use.

After passage of the Act, the Petitioner filed an action in circuit court alleging, among other things, that the Act so restricted the use of his property that it amounted to taking of his property without the payment of just compensation in violation of the Fifth Amendment of the United States Constitution. He did not challenge the reasonableness or constitutional validity of the Act, but instead relied solely upon the loss of use and diminution in value of his property as justification for his taking claim.

The circuit court awarded compensation equal to the fair market value of the two lots as of July 1, 1988, in the amount of $1,170,000 together with real property taxes paid on the property since July 1, 1988, in the amount of $2,400 and simple interest on the mortgage balance of $495,000 at 11% in the amount of $58,987.50. The circuit court relied solely upon the loss of use and diminution in value of the property in determining whether an unconstitutional taking had occurred.

The Respondent, South Carolina Coastal Council, appealed the ruling to the South Carolina Supreme Court. The Supreme Court reversed the circuit court's decision and rejected the Petitioner's contention that the regulation amounted to an unconstitutional taking of his property so as to warrant an award of just compensation.

Prior to the South Carolina Supreme Court rendering its decision in February 1991, the state legislature amended the 1988 Beachfront Management Act to permit new construction seaward of the baseline pursuant to a

special permit. (See Section 48-39-290[D]) Pursuant to this section, the Appellant could seek permission to construct homes or other structures on the lots in question. The Appellant has not availed himself of this opportunity to date.

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Petitioner failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10.

The Petitioner failed to demonstrate in its petition, that any special or important reason for granting Certiorari exists, as required by Rule 10. Rule 10 states that a "Petition for Writ of Certiorari will be granted only when there are special or important reasons therefore." Contrary to the way that the Petitioner characterizes the case, this decision is not in conflict with any decision of the United States Supreme Court, decisions of other state courts of last resort or decisions of the United States Court of Appeals. As seen in Part IV of this Brief, a mere challenge of the constitutionality of an act based upon loss of use or diminution in value alone is insufficient for award of compensation.

II. Petitioner failed to follow Supreme Court Rule 14(H) in that he did not show that federal questions relating to the Fifth Amendment as set forth in the petition were timely and properly raised in order to give this court jurisdiction for a writ of certiorari.

As conceded by the Petitioner, "[t]he question that the Petitioner expected would be resolved by the South

Carolina Supreme Court was whether the regulation so diminished his ownership interest in the coastal property as to constitute a taking requiring compensation under the Fifth Amendment." (Pet. 6-7) No challenge was made to the legitimacy of the public purpose or the counter balancing *importance* of the 1988 Beachfront Management Act in protecting the public from harm. Having ignored entirely any challenge to the state interest side of the takings formula, the Petitioner should be precluded from now seeking a remand of this case to the South Carolina Supreme Court.

The Petitioner's grounds for the Writ of Certiorari come with a certain amount of ill-grace because he blames the South Carolina Supreme Court for its failure to properly balance the private and public interest involved when in fact, he never raised any issue of the state interest. Instead, he relied solely upon his loss of use of the property. The South Carolina Supreme Court recognized this failure on the part of the Petitioner and that it was called upon "by the Petitioner to determine the sole question of whether a taking of property occurs when he is deprived, by operation of the regulation, of 'all economically viable use' of his property." *Lucas v. South Carolina Coastal Council*, ___ S.C. at ___, 404 S.E. 2d at 898.

Given that the Petitioner never took issue with the character of the governmental action nor the nature of the state's interest in the regulation at any point during the trial of this case, he failed to properly preserve his constitutional challenge to the state regulation. This is in violation of Rule 14(H).

III. The Petitioner has failed to exhaust his administrative remedies pursuant to Section 48-39-290(D), Code of Laws of South Carolina, 1976, as amended, that allows for application and issuance of permits to build structures other than erosion control structures or devices seaward of the baseline.

On June 25, 1990, subsequent to the filing of the action in circuit court but prior to the decision of the South Carolina Supreme Court, the 1988 Beachfront Management Act was amended to allow persons to make application for permits to construct man-made structures seaward of the baseline pursuant to Section 48-39-290(D). (A. 125) This allows for a variance from the hard and fast no construction rule of the 1988 Act. There is nothing in this amendment that prevents the Petitioner from applying for a special permit to construct habitable structures seaward of the baseline on the lots in question. To date, he has failed to avail himself of this administrative remedy.

The court has consistently held that a land-use challenge is not ripe where the property owner has not applied for a variance nor filed for a determination of whether a permit would be issued by the regulating agency. *Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986). Based upon this line of cases, the Supreme Court should not consider this case until such time as the Petitioner avails himself of an obvious opportunity to obtain a permit not previously available to him at the time that the action was filed in circuit court.

IV. The South Carolina Supreme Court properly concluded that mere loss of use and diminution of property value alone is not sufficient to equate to an unconstitutional taking of private property pursuant to the Fifth Amendment.

The Petitioner contorts the South Carolina Supreme Court decision into a "bright-line test" in essence accusing the state's highest tribunal of deciding that proper exercise of police power automatically shields that exercise from the just compensation clause of the Fifth Amendment. However, even upon a surface review of the opinion, it is readily apparent that it is the Petitioner who seeks to formulate a "bright-line test", one that would state that loss of use and diminution of property value *alone* is sufficient to award compensation under the constitution. By sleight of hand, the Petitioner transfers his failure to consider the state interest over to the South Carolina Supreme Court complaining that the court failed to properly balance the "private and public interest in the takings calculus . . . " (Pet. 10)

The court, anticipating this legerdemain by the Petitioner, states that the Petitioner "fails to attack in any way the legislature's findings that new construction would cause serious public harm," and that the court was "in no position to, *sua sponte*, take issue with these legislative findings. *Lucas*, 404 S.E. 2d. at 900. All the Petitioner presented was the contention that a taking occurred because he was deprived of "all economically viable use."

The Respondent is unaware of any case which concludes that a taking occurs solely based upon loss of use or diminution in value. Since the South Carolina Supreme

Court was forced by Petitioner's inattention to the balancing of public and private interest to accept the rationality and importance of the legislature's findings and purposes of the Act, it would be a repudiation of the recent jurisprudence of this court to convert the usual careful factual inquiry into a "bright-line test" which ignores the importance of the state interest.

By way of the foregoing, it is ironic that the Petitioner complains that the South Carolina Supreme Court failed to "weigh both public and private interest in the taking calculus and instead relied upon a characterization of the police power implicated in the regulation." (Pet. 10) The simple fact is that the Petitioner brought only one side of the formula to the Court by insisting that the state's interest in the regulation was irrelevant.

For all practical purposes, the Petition should fail at this point. Assuming, however, for the sake of argument that the Petitioner can overcome his self-imposed hurdle of failure to challenge the nature of the state's interest in the regulation, the Petitioner misconstrues the court's decision in the context of *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). Petitioner claims that the South Carolina Supreme Court read *Keystone* to mean that "a mere finding of a legitimate use of police power makes the regulation directed against a nuisance, and thus immune from compensation, even if the effect of regulation is to make the property all but worthless." (Pet. 7) In support of this erroneous conclusion, the Petitioner offers two reasons:

1. "The South Carolina Supreme Court assumed that *Keystone* in effect overturned *Agins* and *Nollan* to the extent that they

> require the public weal in regulation to be weighed against private expectation interests in the property being regulated." (Pet. 7)
>
> 2. The Court failed "to make the distinction between police power and nuisances." (Pet. 10)

The first allegation that the South Carolina Supreme Court misconstrued *Keystone* to read that a mere finding of a legitimate use of police power is an absolute bar to compensation, is without any support in a review of the opinion. The South Carolina Supreme Court articulated the variety of factors used by this court to determine whether or not a taking has occurred, including among those factors:

1. The economic impact of the regulation;
2. The regulation's interference with investment-backed expectations;
3. The character of the government action;
4. The nature of the state's interest in the regulation. *Lucas*, 404 S.E. 2d at 898-899 (citing *Keystone*, 470 U.S. at 485-493.)

Noting that one or more but fewer than all of these factors may be critical and determinative in a given case, the court cited *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for the proposition that any permanent physical occupation occurring under government regulation is characterized as a taking. The opinion also recognized that the United States Supreme Court has never found a taking where the regulation exists to prevent serious public harm. *Lucas*, 404 S.E. 2d at 899; citing

Mugler v. Kansas, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 869 U.S. 590 (1962).

While the court accepts that there is a "special status" for regulations that prevent serious public harm and that this status generally insulates such regulation from takings claims, it specifically recognizes that "merely because the state acts within its public powers does not end the inquiry." *Lucas*, 404 S.E. 2d at 899-900. After noting this general rule that no taking occurs where the state seeks to protect against serious public harm, it finds that the Petitioner never offered the court an opportunity to consider the question of whether or not his situation was an exception to the general rule because Lucas never challenged any aspect of the public interest in the Beachfront Management Act. The court states:

> [W]e note that Lucas does not challenge the fact that legislation here is necessary to prevent serious injury to the community, nor does he contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms. In fact, Lucas does not even seek an injunction to prevent enforcement of the Act. Instead, Lucas merely prays for damages and asserts that he is entitled to such, regardless of how the proposed use of his property harms the public, because all economically viable use of his land has been extinguished." *Lucas*, 404 S.E. 2d at 901.

In short, the South Carolina Supreme Court was never called upon by the Petitioner to balance the private

and public interest in the taking calculus. The court correctly cited *Keystone* in rejecting the proposition held by the coal owners that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), overruled *Mugler* and its progeny, and the mechanical conclusion that "in *all* cases, when *all* economically viable use is extinguished by regulation, compensation is due." *Lucas*, 404 S.E. 2d at 900. (citing *Keystone*, 480 U.S. at 490-492)

The second error that the Petitioner assigns to the South Carolina Supreme Court in its reading of *Keystone* relates to the alleged failure to distinguish between police power and nuisances. Once again, the Petitioner calls upon this court to review an issue never raised at any level of the court proceedings. The South Carolina Supreme Court was not asked to measure the degree of public interest in the Beachfront Management Act.

Setting aside the fact that the distinction between police power and nuisances was not properly preserved, there is nothing in the majority Opinion of *Keystone* to indicate that such a distinction is appropriate for takings analysis, and in this case such an analysis would lead only to a distinction without any material difference.

First, the United States Supreme Court in *Keystone* looked beyond the legal nicety of distinguishing whether a state action is directed against common law nuisance or whether the action is directed against a public harm declared contrary to public health, safety and welfare by statute. *Keystone*, 480 U.S. at 490-493. Where a state restrains uses of property that are "tantamount to public nuisances" what difference can be made, other than that of a semantic nature, between calling the harm a nuisance

or calling it public harm contrary to public health, safety, or welfare? In the final analysis, it is the degree of harm against which the state acts that is important to the takings analysis theory, not the label given the harm.

In *Lucas*, the South Carolina Supreme Court assumed serious public harm based upon the findings and policies of the 1988 Beachfront Management Act. *Lucas*, 404 S.E. 2d at 895-898. The court states as follows:

> By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. This Court is likewise bound by these uncontested legislative findings. *Lucas*, 404 S.E. 2d 898.

The *Lucas* court, like the *Keystone* court, is dealing with a statute that acts "to protect the public interest in health, the environment, and the fiscal integrity of the area." *Keystone*, 470 U.S. at 488. There was no evidence presented by the Petitioner that would indicate that the interests protected by the Act are distinguishable from nuisances and review of the findings of the Act clearly set forth the extreme public importance of the legislation.

CONCLUSION

Based on the foregoing, the Respondent is informed and believes that the United States Supreme Court should deny the application for a Writ of Certiorari.

Respectfully submitted,

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